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No. 05-730

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL HERRING, in his official capacity as Commonwealth's Attorney for the City of Richmond, and WADE A. KIZER, in his official capacity as Commonwealth's Attorney for the County of Henrico,

Petitioners,

— v. —

RICHMOND MEDICAL CENTER FOR WOMEN, and WILLIAM G. FITZHUGH, M.D., on behalf of themselves, their staffs, and their patients,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

In *Stenberg v. Carhart*, 530 U.S. 914 (2000), this Court struck down a Nebraska statute banning so-called "partial-birth abortions" because it did not provide an exception for circumstances in which the procedure was necessary to protect the health of women seeking abortions. 530 U.S. at 937-38. At the core of the Court's decision was the principle that "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.* at 938 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)). This Court recently repeated this mantra, recognizing that "our precedents hold [] that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'" *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967 (2006) (citation omitted).

In direct defiance of this Court's decision in *Stenberg*, the Virginia Legislature enacted the statute at issue in this case. Like the Nebraska statute before it, the Act bans intact and non-intact D&Es and fails to include the health exception mandated in *Stenberg*. It was held unconstitutional by the trial and appellate courts in this case. *See Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005); *Richmond Med. Ctr. for Women v. Hicks*, 301 F. Supp. 2d 499 (E.D. Va. 2004).

Virginia petitioned this Court to review the decision of the Court of Appeals that the Commonwealth's statute banning abortion procedures is unconstitutional. The Petition proposes that the Court review two questions: (1) whether the Constitution requires a statute that prohibits "partial-birth abortion" to provide an exception for the health

of a pregnant woman; and (2) whether a federal court may allow a facial challenge alleging the overbreadth of such a statute. (Pet. 3.) Recognizing that the Court would address related questions in *Ayotte*, however, the Commonwealth observed that "if the Court concludes that federal courts may permit facial challenges alleging overbreadth *and* that the Constitution requires a health exception, then the appropriate course would be to deny certiorari." (*Id.* 4 n.4.) Given that this Court has once again applied its precedent requiring an exception to protect a woman's health in a statute that restricts access to abortion, *Ayotte*, 126 S. Ct. at 967, and given that the Court once again allowed a facial challenge to an abortion restriction, *id.* at 969, as conceded by Petitioners, the proper course here is to deny the petition.

Recognizing that it cannot overcome the evidentiary record in this case, the Commonwealth seeks, in effect, to have this Court overrule *Stenberg*'s requirement that a statute banning abortion procedures supported by substantial medical authority include an exception to protect the woman's health. The grounds asserted in support of the Petition do not, however, provide a sound basis on which to revisit the holding of that case, decided by this Court just over five years ago.

To the contrary, the courts below faithfully followed this Court's decision in *Stenberg*, and the strong evidentiary record in this case demonstrates once more that intact D&E procedures, which are among the procedures banned by the Virginia statute, provide significant safety advantages for some women. Moreover, as the Commonwealth concedes, its position conflicts with the conclusions of every federal court to have considered whether a health exception is necessary since *Stenberg* was announced. Thus, reconsideration of *Stenberg* is unwarranted.

Nor does the Court's decision in *Ayotte* suggest the need for any further consideration of the relief that the District

Court issued, because there is no relief short of facial invalidation that will preserve the constitutionality of the statute while maintaining consistency with the intent of the Virginia Legislature when it enacted the law. Therefore, the Petition should be denied.

COUNTERSTATEMENT

1. Virginia's "Partial Birth Infanticide" Act, Chapters 961 and 963, 2003 Acts of the Virginia General Assembly, Virginia Code § 18.2-71.1 (hereinafter "the Act"),[1] is the latest in Virginia's campaign to ban medically appropriate abortion procedures without exception for circumstances where they are the safest for the woman. In *Richmond Medical Center for Women v. Gilmore,* 224 F.3d 337 (4th Cir. 2000), the Court of Appeals invalidated Virginia's predecessor "partial-birth abortion" statute. Observing that the predecessor statute was "in particulars relevant here . . . indistinguishable from the Nebraska statute at issue" in *Stenberg,* the *Gilmore* court affirmed the district court's judgment of unconstitutionality on the ground that the statute constituted an undue burden on a woman's right to choose an abortion and did not contain a health exception. 224 F.3d. at 339. Three years later, rather than heeding this Court's admonitions in *Stenberg*, which should have called a halt to this campaign, the Virginia Assembly passed the Act, and deliberately repeated the errors that proved fatal to the Nebraska statute struck down in *Stenberg* and the Virginia statute struck down in *Gilmore.*

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[1] The Act is entitled the "Partial Birth Infanticide" Act, but notably is codified at Article 9 ("Abortion") of Title 18.2 ("Crimes and Offenses Generally"), Chapter 4 ("Crimes Against the Person") of the Virginia Code, in the midst of a series of abortion regulations. *See* Va. Code Ann. §§ 18.2-71 ("Producing abortion or miscarriage, etc.; penalty"), 18.2-72 ("When abortion lawful during first trimester of pregnancy").

The Act prohibits what it now terms "partial birth infanticide."[2] It excludes certain abortion procedures from coverage, including suction curettage, suction aspiration, and some non-intact "dilation and evacuation" (D&E) procedures. However, the Act *explicitly* limits the exemption provided to non-intact D&E procedures to a subset of those procedures involving "dismemberment of the fetus prior to removal from the body of the mother." Va. Code Ann. § 18.2-71.1(B). As the District Court found, by excluding only a subset of non-intact D&E procedures from the reach of the prohibition, the Act prohibits all other non-intact D&E variations, as well as intact D&Es.[3] (Pet. App. 68-69 [FF ¶¶ 27, 28].)[4] The Act makes no distinctions based on gestational age and applies to pre-viability abortions early in the second trimester, at approximately 14 weeks of pregnancy as measured from the first day of the woman's last menstrual period ("lmp"). (Pet. App. 65, 77 [FF ¶¶ 19, 53].)[5]

As noted above, the Act contains no exception to its prohibition for circumstances "where it is necessary, in appropriate medical judgment for the preservation of the . . .

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[2] The Act defines "partial birth infanticide" as:

> any deliberate act that (i) is intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother, and that (ii) does kill such infant, regardless of whether death occurs before or after extraction or expulsion from its mother has been completed.

Va. Code Ann. § 18.2-71.1(B). The Act then defines "infant who has been born alive" to include previable fetuses that are still partially in the pregnant woman's body. Va. Code Ann. § 18.2-71.1(C), (D).

[3] The purpose of the Act is thus less obscured than it was in the Nebraska statute at issue in *Stenberg*. The Act *explicitly* prohibits more than intact D&E by exempting only some non-intact D&Es depending on how they progress, leaving the others to be grouped with intact D&Es and labeling them all a form of "infanticide."

[4] The Appendix to the Petition for Certiorari is cited as "Pet. App." "FF ¶" refers to the District Court's factual findings.

[5] Because conception occurs 2 weeks after the lmp date, 14 weeks lmp equals 12 weeks from conception.

health of the mother," *see Stenberg*, 530 U.S. at 931, 937 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)); Va. Code Ann. § 18.2-71.1, and provides only a limited exception for the life of the woman, Va. Code Ann. § 18.2-71.1(E). The Virginia General Assembly rejected amendments to the Act that would have provided an exception for some circumstances when the woman's health was at risk. (Pet. App. 63 [FF ¶ 9].)

The record shows that Respondent Dr. Fitzhugh is a board-certified obstetrician/gynecologist who is a clinical instructor in the Department of Obstetrics and Gynecology at the Medical College of Virginia and Virginia Commonwealth University and has a private practice in obstetrics and gynecology. As part of his practice, he performs abortions and treats women who are experiencing incomplete miscarriages. (Pet. App. 64 [FF ¶¶ 13-14].) The District Court found that in performing abortions and completing miscarriages, Dr. Fitzhugh encounters circumstances in which completing the procedure in the safest, most medically appropriate manner will constitute the crime of "partial birth infanticide." (Pet. App. 87-88.)

Dr. Fitzhugh provides abortions through twenty weeks lmp. (Pet. App. 65 [FF ¶ 16].) Starting at approximately fourteen weeks lmp, Dr. Fitzhugh uses the D&E method, the most common method of pre-viability second-trimester abortion, which accounts for approximately 96% of all second-trimester abortions in the United States. (Pet. App. 65-66 [FF ¶¶ 19, 22].)

When performing these D&Es, Dr. Fitzhugh removes the pre-viable fetus from the woman's uterus through her cervix, vagina, and vaginal introitus[6] using a combination of suction

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[6] During a D&E, Dr. Fitzhugh uses a speculum to hold the vagina open and a tenaculum to apply traction to the cervix. The tenaculum also stabilizes the cervix and holds it closer to the vaginal introitus, or opening. (Pet. App. 66 [FF ¶ 23].) Depending on the woman's body and

and forceps. (Pet. App. 66 [FF ¶ 22].) *See also Stenberg*, 530 U.S. at 925-26; *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 472 (E.D. Va. 1999) [hereinafter *RMCW*]. As Petitioners concede and the District Court found, Dr. Fitzhugh may violate the Act when performing a D&E whether or not he performs a D&E or an "intact D&E." (Pet. App. 77 [FF ¶ 52]; *see also* Pet. App. 12.)

As the District Court also found, in advance of beginning a procedure, physicians performing D&Es cannot know exactly what operative steps will be necessary to remove a fetus or whether the fetus will remain intact. (Pet. App. 70-71 [FF ¶ 32].) The exact manner in which Dr. Fitzhugh performs a D&E will vary depending on the structure and responsiveness of an individual woman's reproductive organs and other surgical conditions and is informed by his experience, skills, and judgments about the woman's health. (*Id.*) The District Court found that there is no way for Dr. Fitzhugh to know before he begins any given procedure whether that particular D&E will result in a situation where he must take steps in violation of the Act in order to complete the abortion in the manner he deems most appropriate for the woman's health. Consequently, because Dr. Fitzhugh could face criminal prosecution under the Act for some D&Es he performs, he faces the possibility of such prosecution *each and every time* he performs any D&E abortion. (Pet. App. 77 [FF ¶ 53].)

As the District Court also found, the evidence demonstrates that the D&Es and intact D&Es that Dr. Fitzhugh performs and that are prohibited by the Act have

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the use of instrumentation during the D&E, at that point the woman's cervical os may be slightly inside the vaginal introitus, in line with the vaginal introitus, or even beyond the vaginal introitus (outside of the woman's body). (Pet. App. 67 [FF ¶ 24].) Petitioners' expert agreed that in some women the cervical os and the vaginal introitus are within one or two centimeters of each other. (Pet. App. 67 [FF ¶ 26].)

many safety advantages over D&Es not prohibited by the Act, including reduced risks of serious complications, such as uterine perforation, cervical rupture, infection, and retained fetal tissue. (Pet. App. 69-70 [FF ¶ 31].) *See also, e.g., Stenberg*, 530 U.S. at 936-37; *Planned Parenthood Fed'n of Am. v. Gonzales*, No. 04-15521, 2006 WL 229900, at *8 (9th Cir. Jan. 31, 2006); *Carhart v. Gonzales*, 413 F.3d 79, 801-03 (8th Cir. 2005); *RMCW*, 55 F. Supp. 2d at 453. Such D&Es may also result in less blood loss and less trauma for some patients. (Pet. App. 69-70 [FF ¶ 31].)

2. The District Court held that the Act violated the privacy interests of women secured by the due process clause for two reasons. First, the District Court held that the Act is "unconstitutional because it fails to contain a health exception." (Pet. App. 85.) Citing record evidence, the District Court found that "[t]here is substantial medical authority, *including testimony from the defendants' experts*, that supports the proposition that banning D&Es, and the manner in which Dr. Fitzhugh performs D&Es, including intact D&Es, could endanger women's health." (Pet. App. 87 [emphasis added].) The District Court pointed to the opinions of Dr. Fitzhugh and another expert witness, who testified, based on their experience and other medical authority, "that the manner in which Dr. Fitzhugh performs D&Es that are prohibited by the Act is both the safest and medically appropriate for some of his patients. . . ." (*Id.*) It observed that "defendants' own expert" did not disagree, having "testified that the manner in which Dr. Fitzhugh completes D&Es is medically acceptable and that criminalizing the way Dr. Fitzhugh performs them could endanger women's health." (Pet. App. 88.)

The District Court found that Petitioners had failed to meet their burden for upholding the Act despite its lack of a health exception. The District Court found that Petitioners had produced no credible evidence controverting the

evidence adduced by Respondents that the manner in which Dr. Fitzhugh performs D&Es is the safest for his patients.

The District Court observed that even if Petitioners *had* presented admissible opinion evidence to contradict the Respondents' medical testimony, they would not have met their burden unless they "prov[e] that a health exception is *never* necessary to preserve the health of women." (Pet. App. 88 [citing *Stenberg*, 530 U.S. at 937-38]; *see also id.* at 88-89 ["'Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary.'"] [quoting *Stenberg*, 530 U.S. at 938].) Even were that not the standard, though, Petitioners still would not have met their burden because, in this case, the Petitioners produced *no* credible evidence whatsoever to contradict Respondents' evidence that an exception is necessary to protect women's health.

Second, the District Court held that the Act "also places an undue burden on women's constitutional right to choose an abortion." (Pet. App. 90 ["The plain language of the Act bans pre-viability D&Es and would cause those who perform such D&Es to fear prosecution, conviction and imprisonment."].) It found that the Act, like the Nebraska statute at issue in *Stenberg* and Virginia's predecessor abortion ban, "ignores the Supreme Court's 'established [] line of demarcation for a State's ability to regulate and proscribe abortion in terms of whether the fetus was viable or nonviable'. . . ." (Pet. App. 90 [quoting *RMCW*, 55 F. Supp. 2d at 480].) It concluded that "the Act also places an undue burden on a woman's ability to choose a D&E abortion and therefore unduly burdens 'the right to choose abortion itself.'" (Pet. App. 90 [quoting *Stenberg*, 530 U.S. at 930 (quoting *Casey*, 505 U.S. at 874)].)

The District Court also found unconstitutional the Act's so-called "life exception," Va. Code. Ann. § 18.2-71.1 (E),[7] because it "impermissibly requires physicians to prioritize the 'health and life' of a pre-viable fetus ahead of the well-being of a woman seeking an abortion." (Pet. App. 91.) It found that the life exception is limited to situations where the prohibited abortion procedure is the only procedure available to save the life of the woman, and would not apply if procedures more dangerous to the health of the woman, such as induction, hysterotomy, or hysterectomy, could be used to prevent death. "Therefore, the 'life exception' forces women to undergo riskier abortion procedures, even when the abortion is necessary to safe her life," in conflict with the constitutional requirement that "'a State may promote but not endanger a woman's health when it regulates the methods of abortion.'" (*Id.* [quoting *Stenberg*, 530 U.S. at 931].) The District Court additionally held that the "life exception" requires an unconstitutional "trade-off" between women's health and survival of a non-viable fetus. That is because, in order for a physician to utilize a prohibited procedure and avoid prosecution, the Act requires the physician to take "every medically reasonable step, consistent with such procedure, to preserve the life and health" of the non-viable fetus. Va. Code Ann. § 18.2-71.1(E). "[W]hen state legislation demands such a 'trade-off' before fetal viability, it

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[7] Va. Code. Ann. § 18.2-71.1(E) provides:

> This section shall not prohibit the use by a physician of any procedure that, in reasonable medical judgment, is necessary to prevent the death of the mother, so long as the physician takes every medically reasonable step, consistent with such procedure, to preserve the life and health of the infant. A procedure shall not be deemed necessary to prevent the death of the mother if completing the delivery of the living infant would prevent the death of the mother.

places a 'substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" (*Id.* [quoting *RMCW*, 55 F. Supp. 2d at 485].)

The District Court also found the Act "void for vagueness, in violation of the Due Process Clause, because its failure to clearly define the prohibited medical procedures deprives physicians of fair notice." (Pet. App. 92.) It found several of the terms of the act "especially ambiguous," and deemed the "life exception . . . so confusing as to be meaningless." *Id.* 94 It concluded that the "Act does not meet the high degree of clarity required where 'the uncertainty induced by the statute threatens to inhibit the exercise of constitutional rights.'" (*Id.* 94 [quoting *RMCW*, 55 F. Supp. 2d at 494 (quoting *Colautti v. Franklin*, 439 U.S. 379 (1979))].)

3. In affirming the District Court's judgment, the Court of Appeals rejected the Commonwealth's arguments that the Act could survive scrutiny without a health exception and that the District Court had incorrectly allowed an attack on overbreadth grounds.

As the Court of Appeals observed, this Court reached its conclusion that the Nebraska statute was unconstitutional based on a wide-ranging review of medical authority comprising the District Court record supplemented with information from a significant array of extra-record medical sources. The Court of Appeals summarized this Court's opinion in *Stenberg* as "hold[ing] that any statute prohibiting the intact D&E/D&X procedure necessarily 'creates a significant health risk' because 'substantial medical authority' confirms the procedure's utility in safeguarding women's health.'" (Pet. App. 11 [quoting *Stenberg*, 530 U.S. at 938].) The Court of Appeals concluded that "[a]ny such statute" – that is, any statute prohibiting the intact

D&E/D&X procedure – "'must [therefore] contain a health exception.'" (*Id.* [quoting *Stenberg*, 530 U.S. at 938].)[8]

The Court of Appeals noted that "it is not disputed in this case that the Act – like the Nebraska statute in [*Stenberg*] – prohibits the intact D&E/D&X procedure." (Pet. App. 12.) It also found "undisputed" that the Act makes no provision for those situations in which the intact D&E/D&X procedure is necessary in appropriate medical judgment for the preservation of the health of the woman. (Pet. App. 13.) It rejected the dissent's argument that the Act does not need a health exception because, unlike the Nebraska statute, it permits some non-intact D&Es. It observed that in *Stenberg*, the "Court addressed the question of whether a health exception was constitutionally required in the context of Nebraska's attempt to criminalize the intact D&E/D&X procedure." (Pet. App. 12.)

It also rejected the Commonwealth's claim that Respondents failed to present substantial medical authority for the proposition that a health exception is needed in "this particular statute" (Pet. App. 14), discussing in detail the

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[8] The Court of Appeals delineated the reasons that informed this Court's "conclu[sion] that substantial medical authority supports the proposition that the intact D&E/D&X procedure offers significant health and safety advantages over alternative methods of late-term abortion." (Pet. App. 10.) First, the procedure allows the fetus to pass through the cervix in one pass, thus reducing operating time, blood loss, trauma, the risk of instrument-inflicted damage to the uterus and of injury from fetal bone fragments, and other risks. Second, the procedure prevents the most common causes of maternal mortality (disseminated intravascular coagulation and amniotic fluid embolus) and eliminates the possibility of serious complications arising from retained fetal tissues. Third, it reduces the risk of cervical injury in circumstances involving nonviable fetuses, because reduction of the fetal calvarium allows a smaller diameter to pass through the woman's cervix. Fourth, the procedure can mitigate the special risks faced by women with prior uterine scars or for whom abortion by induction would be especially dangerous. (Pet. App. 10-11.)

District Court's contrary finding.[9] It concluded that the record evidence, even if the inadmissible evidence offered by the Commonwealth were considered, "would at most indicate some division of medical opinion on the question of whether 'banning [the intact D&E/D&X] procedure could endanger women's health.'" (Pet. App. 14-15 n.1 [quoting *Stenberg*, 530 U.S. at 938].) As this Court noted, the division of "substantial" medical opinion signals the presence of risk, not its absence; thus, "the absence of a health exception will place women at an unnecessary risk of tragic health consequences." *Stenberg*, 530 U.S. at 938.

4. The Commonwealth's petition to the Court of Appeals for a rehearing and rehearing *en banc* was denied by a vote of 10 to 2.

REASONS FOR DENYING THE WRIT

I. There is No Division of Authority that a Statute Banning Intact D&E Abortions Must Contain a Health Exception.

This is a simple case in light of the Commonwealth's concession that the Act would criminalize the intact D&E abortions and some non-intact D&Es that Dr. Fitzhugh performs. (*See* Pet. App. 12 [quoting Petitioners' statements to the Court of Appeals that the Act "does not allow . . . an "intact D&E'" and identifying the "[t]he central issue in this case" as "'whether [Virginia] may prevent use of the . . . intact D&E' procedure"].) The Virginia statute is unconstitutional for precisely the same reasons as was the Nebraska statute in *Stenberg* — because it fails to contain the

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[9] The Court of Appeals also interpreted *Stenberg* as establishing a constitutional rule requiring a health exception when a statute bans the intact D&E/D&X procedure. (Pet. App. 14) As discussed below, however, because the Respondents not only did reproduce the body of medical authority considered by this Court in *Stenberg*, but also supplemented it, this question is not dispositive here.

requisite exception to its prohibitions when necessary to preserve a woman's health.

In *Stenberg,* this Court applied the well-established rule that a restriction on abortion "requires an exception where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother, for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Stenberg*, 530 U.S. at 931 (internal quotations and citations omitted). This Court held that, even if the Nebraska statute had banned only intact D&Es, it was unconstitutional because it did not contain a health exception. The Court noted that state regulations cannot "force women to use riskier methods of abortion." *Id.* As noted, in *Ayotte,* this Court again recognized and applied this core principle when it affirmed the lower court's ruling that the parental notification statute at issue there was unconstitutional because it lacked a health exception and remanded for determination of the appropriate remedy. *Ayotte*, 126 S. Ct. at 967, 969.

This Court concluded in *Stenberg* that given "a District Court finding that D&X significantly obviates health risks in certain circumstances, [and] a highly plausible record-based explanation of why that might be so, . . . we believe the law requires a health exception." *Id.* at 936-37. Because the Act bans at least intact D&E procedures and the record overwhelmingly supports the District Court's conclusion that the intact D&E procedure provides significant safety advantages to women, this case is, as the Court of Appeals held, wholly governed by the decision in *Stenberg*.[10]

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[10] Given the District Court's finding that there is testimony from even Petitioners' own experts "that supports the proposition that banning D&Es, and the manner in which Dr. Fitzhugh performs D&Es, including intact D&Es, could endanger women's health" (Pet. App. 87), the record permits no other conclusion but that "significant medical authority

Contrary to the Commonwealth's assertion, the judgment of the Court of Appeals does not stand for the proposition that "once it is established that a statute regulates abortion, the actual risks, if any, created by the statute and the extent of medical authority, if any, supporting the existence of such risks, are irrelevant." (Pet. 20.) Rather, the Court of Appeals read *Stenberg* to establish the health exception requirement as a constitutional rule when, like the Act, a statute bans the intact D&E procedure. Far from finding irrelevant the nature of the risks created by the Act or the extent of medical authority establishing them, the Court of Appeals placed those considerations at the center of its analysis. In concluding that a ban on intact D&E abortions is unconstitutional without a health exception, the Court of Appeals gave proper respect to the findings of this Court in *Stenberg*. It stated that "[t]his rule is based on substantial medical authority (from a broad array of sources) recognized by the Supreme Court, and this body of medical authority does not have to be reproduced in every subsequent challenge to a 'partial birth abortion' statute lacking a health exception." (Pet. App. 14.) Other courts of appeals that have considered the question agree with that conclusion. *See Carhart v. Gonzales*, 413 F.3d 791, 800 (8th Cir. 2005) (whether a health exception is required for a ban on the intact D&E/D&X procedure is a "question of legislative fact" answered by *Stenberg*; "subsequent litigants need not relitigate questions the Supreme Court has already addressed."); *A Woman's Choice - E. Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) ("Only treating the matter as one of legislative fact produces the nationally uniform approach that *Stenberg* demands."); *cf. Planned Parenthood Fed'n of Am. v. Gonzales*, No. 04-16621, 2006 WL 229900, at *16-20 (9th Cir. Jan. 31, 2006) (holding federal partial birth abortion act unconstitutional because it

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supports the proposition that in some circumstances, [intact D&E] would be the safest procedure." *Stenberg*, 530 U.S. at 932.

lacks a health exception); *Nat'l Abortion Fed'n v. Gonzales*, No. 04-5201-CV, 2006 WL 225828, at *1, *6 (2d Cir. Jan. 31, 2006) (same).[11] The Commonwealth cites no authority to the contrary (Pet. 20), nor could it.

But, importantly, even if *Stenberg* does not establish the health exception requirement as a constitutional rule when a statute bans the intact D&E procedure, the record evidence demonstrates that the Act is unconstitutional. That is because, as the Court of Appeals found, the medical authority before the District Court "is strikingly similar to that considered by the Supreme Court in [*Stenberg*]." (Pet. App. 14 n.1.)[12] Accordingly, the Petition should be denied.

II. There is No Sound Reason to Review the Remedy Ordered by the Lower Courts.

The District Court, consistent with the result in *Stenberg*, declared the Act facially unconstitutional on several theories and enjoined its enforcement in its entirety. The Court of Appeals, affirming the finding that the Act is unconstitutional

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[11] The panel noted the many district courts in agreement. (Pet. App. 16-17.) *See Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 325 F. Supp. 2d 991, 994-95 (W.D. Mo. 2004); *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1013 (N.D. Cal. 2004); *WomanCare of Southfield, P.C. v. Granholm*, 143 F. Supp. 2d 849, 855 (E.D. Mich. 2001); *Summit Med. Assocs. v. Siegelman*, 130 F. Supp. 2d 1307, 1308, 1314 (M.D. Ala. 2001); *Daniel v. Underwood*, 102 F. Supp. 2d 680, 681, 684 (S.D. W. Va. 2000).

[12] It pointed to the testimony of Dr. Fitzhugh and Respondents' expert that "the intact D&E/D&X abortion procedures . . . are the safest and most medically appropriate for some women" and to the Petitioners' expert's testimony that agreed the procedure is "safe and medically appropriate" and should be permitted if physicians "think to do otherwise 'would endanger the woman's health.'" (*Id.*) As further support, the Court of Appeals also cited an *amicus* brief submitted on behalf of thousands of physicians with expertise in reproductive health and abortion procedures urging that "the intact D&E/D&X procedure is an accepted medical procedure that is often the safest available." (Pet. App. 14 n.1.)

because it does not contain a health exception, upheld the facial invalidation of the Act. In its Petition, the Commonwealth asks this Court to review whether federal courts must apply the "no set of circumstances" test of *United States v. Salerno*, 481 U.S. 739, 745 (1987), in a facial challenge to an abortion statute.

However, in *Ayotte*, this Court reaffirmed that plaintiffs may bring preenforcement facial challenges to restrictions on abortion and need not establish that the restriction is unconstitutional in all circumstances to obtain relief.[13] This Court also held that facial invalidation of an abortion statute *in toto* may be the appropriate remedy in some circumstances. Thus, there is no reason to grant Virginia's petition to revisit this question. Nor does the decision in *Ayotte* provide a reason to remit the matter to the lower courts for reconsideration of the remedy they entered, because the considerations outlined in *Ayotte* compel the conclusion that facial invalidation of the Act is the only available remedy.

In *Ayotte*, this Court emphasized "[t]hree interrelated principles" that must guide the courts when considering the remedy for a statute that unconstitutionally impedes access to abortion. *Ayotte*, 126 S. Ct. at 967. First, the court should try to invalidate no more of a statute than is necessary. *Id.* Second, "mindful that [the courts'] constitutional mandate and institutional competence are limited," courts must "restrain [themselves] from 'rewrit[ing] a state law to conform it to constitutional requirements' even as [they] strive to salvage it." *Id.* (quoting *Virginia v. Am. Booksellers*

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[13] Thus, *Ayotte* puts to rest any doubt that, contrary to the Commonwealth's contention, *Salerno*'s "no set of circumstances" rule has not been the standard litigants must meet in order to succeed in invalidating an unconstitutional statute on its face. *See Sabri v. United States*, 541 U.S. 600, 609-10 (2004) ("recognize[ing] the validity of facial attacks alleging overbreadth (though not necessarily using that term)" in several settings, including free speech and abortion cases).

Ass'n., 484 U.S. 383, 397 (1988)) (third alteration in the original). Finally, "a court cannot 'use its remedial powers to circumvent the intent of the legislature,'" *id.* (quoting *Califano v. Westcott,* 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)). Thus, after finding an application or portion of a statute unconstitutional, the courts must ask: "Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* When answering this last question, the courts must be "wary of legislatures who would rely on our intervention" by setting "'a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied." *Id.* (quoting *United States v. Reese,* 92 U.S. 214, 221 (1875)). Applying these three principles to this case, it is plain that facial invalidation of the Act is the only appropriate remedy.

A. Injunctive Relief Engrafting a Health Exception Onto the Act Would Conflict With the Legislature's Intent.

Even if the Act's prohibition were limited to intact D&Es and it was unconstitutional solely because it lacked a health exception, entry of an injunction that prevented application of the Act to circumstances where the banned procedures were the safest would not be warranted because it would conflict with the intent of the Virginia Legislature. The General Assembly's repeated efforts to ban medically appropriate methods of abortion without providing a medical exception reflect the Legislature's preference for no statute at all to one that conforms to constitutional mandates.

The District Court found that the "General Assembly rejected amendments . . . that would have provided an exception for some circumstances when the woman's health was at risk." (Pet. App. 63 [FF ¶ 9].) *See also* H.B. 1541, 2003 Leg., Reg. Sess. (Va. 2003); S.B. 1205, 2003 Leg., Reg. Sess. (Va. 2003.) The Legislature eschewed the inclusion of

a provision that provided a health exception against the background not only of this Court's judgment in *Stenberg*. It refused the Governor's recommendation to include a health exception even though its enactment of a similarly defective statute had recently failed constitutional review for the very same reason, after *Stenberg* was announced. *See Richmond Med. Ctr.*, 224 F.3d at 338-39. The Legislature's resistance to the inclusion of a health exception in a "partial birth abortion" statute in the face of repeated judicial warnings of its necessity unambiguously confirms that it considered omission of a health provision a critical component of the Act. As the court noted in *Planned Parenthood Federation*, affirming the facial invalidation of a similar federal statute:

> Congress, notwithstanding existing Supreme Court law and the multiple opportunities it was given to limit the Act's scope, passed an overly broad ban that it was aware likely violated the Constitution. . . . Congress left it to the judiciary to sort out which parts of the statute are constitutional and which are not. This is precisely what *Ayotte* reminded us Congress may not do.

2006 WL 229900, at *19. A judicial remedy that would save the Act under these circumstances would surely invite Virginia's and other states' legislatures to flout such admonitions in the future.

Nor could one conclude that the Legislature would have "preferred what is left of its statute to no statute at all." *See Ayotte*, 126 S.Ct. at 968. As the court in *Planned Parenthood Federation* pointed out, the judiciary is ill-equipped to determine how a legislature "would exercise its moral and other judgments with respect to tactical political decisions," such as the judgments that were undoubtedly

involved in the drafting of and advocacy for the Act. *Planned Parenthood Fed'n*, 2006 WL 229900, at *18.[14]

The Act does not present an opportunity for a court "to sever its problematic portions while leaving the remainder intact," *Ayotte*, 126 S. Ct. at 967 (citing *United States v. Booker*, 543 U.S. 220, 227-29 (2005)), because the Act's constitutional defect results from an omission that obviously cannot be severed from the remainder. The only way to *remove* language to cure the constitutional defect would be to delete the very core of the Act, that is, the prohibition on procedures set forth in subsection B. If it were, nothing of the Act would remain.[15]

Engrafting a health exception onto the Act when the Commonwealth has been at pains to avoid its inclusion would conflict with the Legislature's intent and would be inconsistent with the courts' proper role. Accordingly, there is no reason for further consideration of the relief ordered by the lower courts.

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[14] Even if it were possible to draft an injunction that prevented the application of the statute where the banned procedures were the safest for the patient, it is unclear what, if anything, such an injunction would leave to enforce. Dr. Fitzhugh does not perform procedures banned by the Act unless they are the safest. His medical practice is devoted to just this aim.

[15] Further, the Legislature did not include a severability provision in the Act. In *Ayotte*, this Court considered the inclusion of a severability clause as an indication of the New Hampshire Legislature's intent that the statute there under review was susceptible of an injunction against unconstitutional applications. Although it is true that the Commonwealth has a statutory severability provision applicable to all of its enactments, *see* Va. Code. Ann. § 1-243, the existence of that general provision does little to demonstrate the Legislature's preference for a health exception over no statute at all.

B. *Ayotte* Precludes Drafting Injunctive Relief to Cure the Statute's Overbreadth.

As the District Court held, the Act is unconstitutional for reasons in addition to its failure to include an exception to the prohibition on the intact D&E procedure to preserve the health of the pregnant woman. As the District Court held, its "plain language . . . bans pre-viability D&Es and would cause those who perform such D&Es to fear prosecution, conviction and imprisonment." (Pet. App. 90.)[16] Like the Nebraska statute at issue in *Stenberg*, then, the Act "impos[es] 'an undue burden on a woman's ability' to choose a D&E abortion," and therefore "unduly burdens 'the right to choose abortion itself.'" (Pet. App. 90 [quoting *Stenberg*, 530 U.S. at 930 (quoting *Casey*, 505 U.S. at 874)].)

Issuing an injunction to narrow the scope of the prohibition would require the courts to strike the principal section delineating the prohibition and draft a completely new section with new terms and new definitions. In doing so, the courts would be required to "make decisions that are the prerogative of elected officials and thus would be inconsistent with the proper distribution of responsibilities between the legislative and judicial branches." *Planned Parenthood Federation*, 2006 WL 229900, at *19. It would also violate the Legislature's clear intent to include some non-intact D&Es within the prohibition. Thus, the Act does not present a situation where "the legitimate reach of [the statute] 'dwarfs its arguably impermissible applications.'" *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (quoting *New York v. Ferber*, 458 U.S. 747, 773 (1982)).

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[16] As noted above, the prohibited procedures explicitly include not only the intact D&E but also a subset of non-intact D&Es where disarticulation of a fetus occurs when the fetus is partially in and partially out of the woman's body. This can happen when there is little or no space between the cervical os and the vaginal introitus or when the cervical os prolapses outside the vaginal introitus (Pet. App. 7), a circumstance confronted by Dr. Fitzhugh in one-third of his patients.

The Commonwealth argues that the statute should remain in effect to prevent a full term baby from being killed in the process of delivery (Pet. 14), citing a number of newspaper articles. Not only is there no evidence that the Virginia Legislature contemplated the horrific examples the Commonwealth dreams up, the articles it cites do not involve the type of killings it claims the Legislature was concerned with when it codified the Act in the "abortion" section of the criminal code, much less describe incidents that occurred in Virginia. There is little to be gained for the legislative process, and much to be lost by the judiciary, if the courts are to engage in drafting of an injunction to preserve the application of the Act only to conduct that the legislature did not likely consider.

C. Invalidation of the Entire Statute is Also Required Because the Act is Void for Vagueness.

As the District Court held, the Act is also unduly vague because it fails to give adequate notice as to what conduct is prohibited. (Pet. App. 93-94.)[17] As this Court has held, the vagueness doctrine permits wholesale invalidation of a statute in a "facial challenge if the law reaches 'a substantial amount of constitutionally protected conduct.'" *Kolender v. Lawson*, 461 U.S. 352, 358 n.8, 361-62 (1983) (facially invalidating statute requiring persons validly stopped by police to provide "credible and reliable" identification) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). Such is the case here.

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[17] As the District Court held, the Act is also unconstitutional because its "life exception" is inadequate (Pet. App. 91) and because it could subject a physician to prosecution for completing a miscarriage in a safe and medically appropriate manner for a woman who presents in mid-miscarriage. (Pet. App. 74-75 [FF ¶ 47], 92.)

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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